

1 given 120 days to do so. On January 27, 2011, Petitioner moved for the appointment of new
2 counsel and this Court scheduled a hearing [ECF 90]. However, before the hearing, Petitioner
3 withdrew his motion [ECF 91] and the hearing was vacated [ECF 92]. On February 18, 2011 the
4 parties filed a Stipulation to Extend the Time to File an Amended Petition [ECF 93] which was
5 granted by this Court that same day [ECF 95]. The new deadline was April 23, 2011. A second
6 and third stipulation to extend the deadline was filed and granted by the Court [ECF 101]
7 resulting in a new deadline of August 4, 2011. On August 4, 2011, counsel filed a Motion to
8 Withdraw as Attorney [ECF 104] citing a breakdown in communications and this Court
9 scheduled a hearing. At the hearing [ECF 108], the parties advised that they had resolved their
10 differences and this Court granted the request for a new deadline for the filing of an Amended
11 Petition – September 26, 2011. However, no Amended Petition was ever filed.

12 Section 2255 provides post-conviction relief to federal prisoners on four grounds: (1) the
13 sentence imposed violated the Constitution or laws of the United States, (2) the court lacked
14 jurisdiction to impose the sentence, (3) the sentence exceeds the maximum authorized by law, or
15 (4) the sentence is otherwise subject to collateral attack. *Hitchcock v. United States*, 580 F.2d
16 964,965 (9th Cir. 1978). Section 2255 applies to non-jurisdictional claims based on a federal
17 statute or rule only if the claim alleges a “fundamental defect which inherently results in a
18 complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of
19 fair procedure.” *Hill v. United States*, 368 U.S. 424, 428 (1962).

20 Petitioner’s original 2255 petition [ECF 58] raises four grounds: (1) that the image on the
21 internet that formed the basis for his guilty plea, was not actually pornographic or unlawful; (2)
22 that his trial attorney, Todd Leventhal¹, was ineffective for failing to file a motion for a
23 downward variance or argue for a sentence of time served; (3) that the sentence imposed resulted
24 in an unwarranted disparity pursuant to *United States v. Brandon Beiermann* (8th Circuit case);


25 ¹ Petitioner was also represented by attorney Leo Flangas but does not appear to be raising any claims in regards to his representation.

1 and (4) that the sentence imposed violated the Eighth Amendment of the United States
2 Constitution.

3 **This Court finds that Petitioner has raised cognizable claims and therefore Orders**
4 **the Government to respond and file a Response within thirty (30) days from the date of this**
5 **Order. Petitioner shall have fourteen (14) days from the date the Government's Response**
6 **is filed to file a Reply.**

7 As this is the first time that the Government has been ordered to respond to Petitioner's
8 claims, Petitioner's previous Motion for the Government's Response [ECF 102] is **DENIED,**
9 **without prejudice.** When the Government does file its Response, it shall provide Petitioner with
10 a copy.

11 DATED this 4th day of January, 2012.

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15 Gloria M. Navarro
United States District Judge
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